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and James Clements

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BARNSTORMERS, Inc., a Nevada Corporation,

Plaintiff,

V.

WING WALKERS, LLC, a Delaware  
LLC, JAMES CLEMENTS, an  
individual; and DIRECTNIC, LLC, a  
Louisiana LLC,

Defendant.

CASE NO: 3:09-CV-02367-BEN-RBB  
**POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO  
DISMISS; ALTERNATIVELY TO  
TRANSFER FOR IMPROPER  
VENUE; ALTERNATIVELY TO  
TRANSFER FOR CONVENIENCE**  
Date: January 19, 2009  
Time: 10:30 a.m.  
Room: 3

**POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS;  
ALTERNATIVELY TO TRANSFER FOR IMPROPER VENUE;  
ALTERNATIVELY TO TRANSFER FOR CONVENIENCE**

## I. INTRODUCTION

This case is about alleged copyright infringement. Mr. James Clements, a Texas resident and defendant Wing Walkers, LLC, a Delaware LLC are accused of copyright infringement. Wing Walkers, LLC, a Delaware LLC handled the website operations until October 16, 2009 when Wing Walkers was incorporated as a Texas nonprofit corporation. Wing Walkers, A Texas nonprofit corporation handled the website operations from October 16, 2009.

Wing Walkers, A Texas nonprofit corporation (hereafter “Wing Walkers”) operates a website where owners of airplanes can post advertisements for their

1 airplanes. Wing Walkers is an online publisher of airplane advertisements. Wing  
2 Walkers does not sell airplanes or any other goods on its website. The website is a  
3 passive website and does not have a shopping cart or other electronic commerce  
4 capability for direct interaction with customers.

5 Directnic, LLC is WingWalkers.com's domain registrar and host and  
6 therefore would be a service provider under section 512 of the Digital Millennium  
7 Copyright Act (DMCA) so they should be immune since they are part of the  
8 Internet infrastructure protected under DMCA which protects ISPs Sec. 512(a),  
9 system caches Sec. 512(b), storage systems Sec. 512(c), and search engines Sec.  
10 512(d).

11 Also, there is no proof in front of the court that there was any copyright  
12 infringement, or access of a computer. The website printout presented to allege  
13 copyright infringement is a short text description which lacks artistic expression  
14 required for copyright infringement. The alleged access of a computer has no  
15 proof supporting the allegation. Since anyone can access either one of the plaintiff  
16 or defendants websites freely, anyone can post any free advertisement they wish  
17 and there is no proof of any connection between James Clements and the alleged  
18 wrongdoing.

19 Defendants do not consent to personal jurisdiction and appears specially.  
20 Defendants bring a motion to dismiss for lack of personal jurisdiction under FRCP  
21 12(b)(2). Plaintiff is a Nevada Corporation and sued defendant, a Delaware LLC  
22 in San Diego for copyright infringement. As seen from the face of the complaint,  
23 this case has nothing to do with San Diego except that plaintiffs attorney is in San  
24 Diego.

25

26 II. STANDARD FOR ASSERTING PERSONAL JURISDICTION

27 In federal question cases, where no explicit federal statute governs  
28 jurisdiction, a federal court may exercise personal jurisdiction over a nonresident

1 defendant if that defendant “could be subjected to jurisdiction of a court in the state  
2 in which the district court is located.” Fed. R. Civ. Pro. 4(k)(1); American  
3 Telephone & Telegraph Co. v. Compagne Bruxelles Lambert, 94 F. 3d 586, 590  
4 (9th Cir. 1996). Thus, the federal court’s power to exercise personal jurisdiction  
5 over a defendant is generally coextensive with that of the courts in the state in  
6 which it sits. The California long arm statute extends personal jurisdiction to the  
7 constitutional due process.

8 The due process clause requires that the defendants sufficient minimum  
9 contacts with the forms of traditional notion and substantial justice. See  
10 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In determining  
11 whether the exercise of jurisdiction satisfies this standard, the Court must consider  
12 not only the nature of the contacts, but their relation to the litigation.  
13 General jurisdiction exists where the defendant has “substantial” or “continuous  
14 and systematic” contacts with the forum state. See Helicopteros Nacionales de  
15 Columbia v. S.A. Hall, 466 U.S. 408, 414-16 (1984); Metropolitan Life Ins. V.  
16 RobertsonCeco Corp., 84 F.3d 560, 568 (2d Cir. 1996). General jurisdiction can  
17 be assessed by evaluating the defendant’s contacts with the forum over a  
18 reasonable number of years, up to the date the suit was filed. See Access Telecom,  
19 Inc. v. MCI Telecomm. Corp., 197 F.3d 694, 717 (5th Cir. 1999).  
20 Here, the defendant alleges that any contacts it may have had with the forum state  
21 were not systematic or continuous enough to justify the exercise of personal  
22 jurisdiction. Soliciting business in the forum state and selling products through  
23 dealers in the forum state allowed personal jurisdiction in Metropolitan Life, 84  
24 F.3d at, 571. Defendant has not sold products to California residents and has not  
25 made any sales in California.

26 Internet contacts have been specially addressed. Most courts have adopted  
27 the “sliding scale” approach first seen in Zippo Mfg. Co v. Zippo Dot Com, Inc.,  
28 952 F.Supp. 1119, 1124 (W.D. Pa. 1997). On the one hand a resident’s ability to

1 access a passive website that does no more than provide information will typically  
2 not provide a basis for jurisdiction. See GTE New Media Servs., Inc. v. BellSouth  
3 Corp., 199 F.3d 1343, 1349 (D.C. Cir.2000) (personal jurisdiction can not be based  
4 solely on the ability of residents to access the defendant's websites). On the other  
5 hand a defendant that "conducts business" over the Internet with the residents of a  
6 forum will usually be found subject to that forum's jurisdiction. Zippo, 952  
7 F.Supp. at 1124. But where the website is somewhere in the middle, the user  
8 exchanges information with the host computer, the court must review the "level of  
9 interactivity and commercial nature of the exchange of information" to determine  
10 if the exercise of jurisdiction is proper. Zippo, 952 F.Supp. at 1124. In any case,  
11 the Internet contacts are combined with the defendant's traditional contacts to  
12 determine whether the requisite minimum contacts exist. Millennium, 33  
13 F.Supp.2d at 918.

14 Defendant alleges facts to defeat jurisdiction. Defendant requests an  
15 evidentiary hearing. An evidentiary hearing requires that Plaintiff prove its  
16 grounds for personal jurisdiction by a preponderance of the evidence.  
17 Metropolitan Life, 84 F.3d at 567.

18 Where general jurisdiction is not present, a defendant may still be subject to  
19 jurisdiction arising out of a specific act or acts, thus the term "specific  
20 jurisdiction." Specific Jurisdiction exists when a cause of action arises from forum  
21 related activities. See Halsten v. Gross Valley Medical Reimbursement Fund, Ltd.,  
22 784 F.2d 1392, 1397 (9th Cir. 1986). Specific jurisdiction over a defendant is  
23 present where (1) the defendant purposely availed himself of the privilege of  
24 conducting activities in the forum state, (2) the claim arises out of or results from  
25 the defendant's forum related activities, and (3) the exercise of jurisdiction is  
26 reasonable. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985).  
27 Plaintiff bears the ultimate burden of establishing jurisdiction over defendant by a  
28 preponderance of the evidence. Here Plaintiff does not allege specific jurisdiction.

1 The traditional notions of fair play and substantial justice suggest that any  
2 transaction leading to this suit should not be held in a location where both Plaintiff  
3 and Defendant do not reside.

4

### 5 III. MINIMUM CONTACTS ANALYSIS

6 Wing Walkers should not be held to have minimum contacts with the state  
7 of California. Wing Walkers allows airplane owners to post advertisements of  
8 their airplanes on the WingWalkers.com website which is accessible worldwide.  
9 The website does not collect a fee for posting advertisements. Owners take photos  
10 of their airplanes and post them online, but the photos are accompanied by text  
11 which the plaintiff alleges that the defendants copied.

12 The court can visit the website to confirm that the Wing Walkers website has  
13 minimal functionality. Wing Walkers has not done business with anyone in  
14 California. The service is a free service. Therefore, Wing Walkers does not  
15 engage in any sales of products to California residents because the defendants do  
16 not sell any products.

17 Specific jurisdiction is also inapplicable. Plaintiff has had no transaction  
18 with Defendant to lead to this claim of copyright infringement. Wing Walkers  
19 operates a website that makes no advertising revenue on any of the banner or  
20 classified advertisements.

21 The plaintiff is a Nevada Corporation and has not qualified to do business in  
22 California. According to the Secretary of State website, "Before transacting  
23 intrastate business in California the business must first qualify/register with the  
24 California Secretary of State. (California Corporations Code section 2105,  
25 15909.02, 16959 or 17451.) California Corporations Code sections 191,  
26 15901.02(ai) and 17001(ap) define "transacting intrastate business" as entering into  
27 repeated and successive transactions of its business in this state, other than  
28 interstate or foreign commerce." Thus, plaintiff should be estopped from asserting

1 that any cause of action arises from their operation of a nonregistered business  
2 from California.

3

4 IV. STANDARD FOR DETERMINING VENUE

5 For a defendant corporation the propriety of venue follows from the court's  
6 analysis of personal jurisdiction.

7 28 USC 1391 (b) provides that "A civil action wherein jurisdiction is not  
8 founded solely on diversity of citizenship may, except as otherwise provided by  
9 law, be brought only in (1) a judicial district where any defendant resides, if all  
10 defendants reside in the same State, (2) a judicial district in which a substantial part  
11 of the events or omissions giving rise to the claim occurred, or a substantial part of  
12 property that is the subject of the action is situated, or (3) a judicial district in  
13 which any defendant may be found, if there is no district in which the action may  
14 otherwise be brought."

15 28 USC 1391 (c) "a defendant that is a corporation shall be deemed to reside  
16 in any judicial district in which it is subject to personal jurisdiction at the time the  
17 action is commenced".

18

19 V. STANDARD FOR ASSERTING CHANGE OF VENUE FOR  
20 CONVENIENCE

21 Venue is inconvenient for the defendants in this district and more convenient  
22 in Texas; therefore, the court should transfer the suit to the Western District of  
23 Texas, which is the most convenient forum.

24 The court may transfer a suit to any other district or division where it might  
25 have been brought for the convenience of the defendant or its witnesses and in the  
26 interest of justice. 28 U.S.C. §1404(a).

27

28 VI. APPLICATION OF CHANGE OF VENUE FACTORS

1 The court should grant defendant's motion to transfer for the following reasons:  
2 a. The present forum is inconvenient for the defendant, and the transfer will not  
3 inconvenience plaintiff. Sorrels Steel Co. v. Great Southwest Corp., 651 F.Supp.  
4 623, 629 (S.D. Miss. 1986).

5 The plaintiff is a Nevada Corporation and has not qualified to do business in  
6 California. Therefore, the plaintiff should be deemed to operate from Nevada.  
7 Either way, the plaintiff would be suing out of state. If the court transfers venue to  
8 Texas, it will be more convenient for defendants. There no evidence located in  
9 California because defendant's work, business are conducted in Texas and Plaintiff  
10 is domiciled in Nevada.

11 b. A transfer to another district would be more convenient for the defendant's  
12 material witnesses. 28 U.S.C. §1404(a); Mohamed v. Mazda Motor Corp., 90  
13 F.Supp.2d 757, 774-75 (E.D. Tex. 2000); Laumann Mfg. Corp. v. Castings USA,  
14 Inc., 913 F.Supp. 712, 720 (E.D. N.Y. 1996). Specifically, the following witnesses  
15 could be called at trial regarding the operation of the Wingwalkers website and  
16 could be able to testify as alibi regarding Jim Clements lack of involvement with  
17 the Barnstormers website and the scope of his involvement with Wingwalkers,  
18 namely: Keith Cole, Bob Larrabee, Steve Dyck, Jack Jarvis, Ken Hopper, Larry  
19 Parkrtletts, Al Brailey, Jim Hoffman, Bill Hall, Steve Deraps, May Carson, Ray  
20 Bartlett, Vanessa Deraps, among other witnesses who would be greatly burden in  
21 coming to California, but are local to Texas.

22 As additional witnesses are found, they may likely reside in Texas and have  
23 some connection with the Texas aviation community, and within the Texas  
24 Christian missionary community. These witnesses would have knowledge of the  
25 nature and quality of the advertisements, and the extent of Mr. James Clements  
26 personal involvement with the website and his lack of involvement with the  
27 Barnstormers website.

1 c. Documents necessary for the defense of this suit are not located in the  
2 current forum and may be difficult to transport. Access to documents and other  
3 sources of proof will be easier in Texas as defendants books are in Texas.  
4 d. Litigating the case in this district would force citizens in a community with  
5 no connection to the litigation to serve on the jury. The plaintiff is not a California  
6 Corporation and has not qualified to do business in California. Thus, it would be  
7 unfair to the citizens of the judicial district to get involved in a matter regarding a  
8 Nevada Corporation that has not bothered to qualify to do business in California,  
9 since they do not do business in California. This case is a dispute between a Texas  
10 Corporation and a Nevada Corporation and simply has nothing to do with  
11 California.

12 e. The proposed forum in Texas is equally familiar with the law that will  
13 govern the case, namely copyright infringement under 17 U.S.C. §501, et seq.

15 VII. APPLICATION OF CHANGE OF VENUE FACTORS

16 An evidentiary hearing is only requested if the court feels that it is necessary. The  
17 court may not feel that an evidentiary hearing is necessary because generally a  
18 passive website does not lead to a finding of personal jurisdiction. Furthermore,  
19 because the witnesses necessary to exonerate Mr. James Clements in this matter  
20 are located in Texas, the court should transfer the case to Texas to further the  
21 interests of justice, for judicial economy, and to avoid burden on third parties.

22 Dated: December 11<sup>th</sup>, 2009                    NEWHOPE LAW, PC

23    By: s/Clement Cheng  
24    Clement Cheng, Esq.  
25    Attorney for Plaintiffs  
26    E-mail: law@clemcheng.com

**PROOF OF SERVICE**

BARNSTORMERS v. WING WALKERS, LLC, JAMES CLEMENTS; and DIRECTNIC, LLC 3:09-cv-02367-BEN-RBB

I am employed in the Central District of California. I am over the age of 18 and not a party to the action. My business address is at 17220 Newhope Street, Suite 127, Fountain Valley, CA 92708. On December 11th, 2009, I served the foregoing document(s):

**POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS;  
ALTERNATIVELY TO TRANSFER FOR IMPROPER VENUE;  
ALTERNATIVELY TO TRANSFER FOR CONVENIENCE**

on the interested parties in this action:

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*Attorneys for Plaintiff*

- BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the offices of the addressee(s).
- BY MAIL: I am readily familiar with the practice of the office for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, correspondence is put in the office outgoing mail tray for collection and is deposited in the U.S. Mail that same day in the ordinary course of business.
- FAX: I faxed the documents to the parties on the above date.
- E-MAIL: I emailed the documents to the parties on the above date.
- FEDERAL: I declare under penalty of perjury under the laws of the United States that the foregoing is true and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.
- STATE: I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct.

Executed on December 11th, 2009 at Fountain Valley, CA.

Signed:   
Alison Hata